In the Supreme Court of the United States

OCTOBER TERM, 1924

NICHOLAS WEBSTER, APPELLANT
v.
ALBERT B. FALL, SECRETARY OF THE INTERIOR; J. GEORGE WRIGHT, Superintendent of the Osage Agency, et al. } No. 149

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLEES

STATEMENT

By section 4 of the Act of March 3, 1921, c. 120, 41 Stat. 1249, 1250, Congress provided that the Secretary of the Interior should pay to each adult member of the Osage Tribe, not having a certificate of competency, $1,000 quarterly of the income of such member representing his pro rata share, either as a member or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties under leases.

Nicholas Webster is a member of the Osage Tribe without a certificate of competency.

Because he drank intoxicating liquors "which were within convenient reach," Webster was carried on

a "drunk list," made a part of the records of the Osage Indian Agency. For that reason the officers charged with the duty of making the quarterly payments refused to pay him certain money which otherwise would have been paid to him as income. The ground upon which this refusal was predicated was § 2087, R. S., and the regulations of the Secretary of the Interior thereunder. That section is as follows:

> No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country.

To compel the payment of the moneys withheld, and to enjoin the enforcement against him of § 2087 and of the regulations, Webster filed this suit in the United States District Court for the western district of Oklahoma, naming as defendants Albert B. Fall, Secretary of the Interior; J. George Wright, Superintendent of the Osage Agency; and George N. Wise, Special Disbursing Agent.

Service was not had on Mr. Fall, but was made on Messrs. Wright and Wise. A motion to dismiss and an answer were filed on behalf of these two (R. 9, 10); the case proceeded to a trial, and a decree was entered dismissing the bill for want of equity and on the merits.

From that decree Webster took a direct appeal to this Court under § 238 of the Judicial Code.

ARGUMENT

I

The Secretary of the Interior a necessary party

With respect to the official status of defendants Wright and Wise the bill of complaint alleges as follows:

> That the defendant J. George Wright is the Superintendent for the United States in charge of the Osage Agency, and resides and receives his mail in Pawhuska, Oklahoma, the seat of the Osage Agency, same being an Indian Agency for and over the Osage Tribe of Indians in Oklahoma, and established by the United States; that the defendant George N. Wise is a Special Disbursing Agent of the United States whose duty is to pay and disburse the funds and moneys due Individual Osages to such individual, the said Wise residing in Pawhuska, Oklahoma, the seat of the Osage Agency. (Par. 1, R. 2.)
>
> That the defendant, J. George Wright, as superintendent of the Osage Agency, is the local representative of the Department of the

> Interior for the Osage Agency and has charge as Superintendent of the Osage Agency and its employees, but under the direction of the Secretary of the Interior, to whom, and his agents and employees, the Superintendent makes his reports as such Superintendent; that as such Superintendent he, in conjunction with the defendant, George N. Wise, is charged with the duty of making the quarterly payments to Osage Allottees. (Par. 3, R. 2.)
>
> That the defendant, George N. Wise, as such Special Disbursing Agent of the United States, is, among other things, charged with the duty of making quarterly requisition on the Treasury Department of the United States, for money with which to make payment to the individual Osage Allottees, and the said George N. Wise does make such quarterly requisitions, and does receive the money with which to make such quarterly payments, and does receive the money with which to pay quarterly this plaintiff, the amount due this plaintiff and other Osage Allottees, but the said George N. Wise and the said J. George Wright fail and refuse to make the quarterly payments to this plaintiff, as required by law, as will be more fully set forth hereinafter. (Par. 4, R. 2, 3.)

These allegations make manifest that Superintendent Wright and Disbursing Agent Wise are subordinates of the Secretary of the Interior. And in fact they are. In the refusal to make the payments to Webster these officers are acting under the "orders, rules, and regulations issued to J. George Wright and

Geo. N. Wise, by the defendant Albert B. Fall, and his predecessors in office." (Par. 17, R. 6.)

According to the statement of the evidence (R. 12) the payments "would have been made to the plaintiff by the defendants, J. George Wright, Superintendent, and George N. Wise, Disbursing Agent, except for section 2087 of the Revised Laws of the United States, and regulations issued to carry into effect said section."

It is clear that the suit should not have proceeded in the absence of the Secretary of the Interior, who was a necessary party. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Gnerich* v. *Rutter*, 265 U. S. 388.

We therefore submit that this court should not pass upon the merits of the case, but, conformably to the procedure followed in the cases cited, should reverse the decree below and direct that the bill be dismissed for want of a necessary party.

II

The jurisdiction of the District Court

The bill avers that the amount in controversy is over $3,000 (par. 2, R. 2), and in paragraph 16, R. 5, 6, it is stated that in July, 1922—

> there was due this plaintiff by virtue of the Act of March 3, 1921, in excess of $3,000, which amount was so unlawfully, arbitrarily, and capriciously withheld by said defendants; that there was a regular quarterly payment made in September of 1922, and a regular

> quarterly payment is to be made in December, 1922, and other and many quarterly payments to follow until the year 1946; that this plaintiff is forty-seven years of age, of sound body, and in the natural course of men of his age and physical condition should live many years in which to receive and enjoy the income to be paid to him at the regular quarterly payments aforesaid.

The answer denied the allegation of paragraph 2 as to the jurisdictional averment, and asserted that at the time of filing of suit there was due to plaintiff $1,770.38 and that this was the amount subject to the "controversy under discussion." (R. 9.)

In the Statement of Evidence the following appears:

> that at the time this suit was instituted by the plaintiff in December, 1922, there was due to the plaintiff from the defendants, from the source aforesaid, $1,770.38. (R. 12.)

Since there was lacking the jurisdictional amount required to maintain a suit of this character in the District Court (§24, par. 1, Judicial Code), the Court should have dismissed the bill for want of jurisdiction. As the question of jurisdiction is fundamental, the appeal itself presents that question to this court. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194.

To make a case on the point of jurisdiction, appellant argues that because subsequently accruing quarterly payments are withheld and as he will be entitled to others accruing in the future years, the

action of defendants will affect a sum in the aggregate greatly in excess of the jurisdictional amount. (Brief, pp. 23, 24.) But it is conceded that when the suit was instituted $1,770.38 was the amount to which appellant was then entitled. What would become due and payable later was a matter of speculation, and in any event would have no effect in the determination of whether the suit as instituted could be maintained.

Appellant also refers to the fact that his total *income* from March 3, 1921, to December 9, 1922, when suit was filed, was $20,000 and since the case has been heard more than $15,000 have been added to it. We do not see the relevancy of that. Since he is an Osage not having a certificate of competency, the Secretary, under the Act of March 3, 1921, was authorized to pay him quarterly but $1,000 no matter how much more there was available as his pro rata share. (*Work* v. *Lynn*, decided Nov. 17, 1924.)

The cases cited by appellant as supporting his claim that an amount sufficient to sustain jurisdiction was involved, do not cover his case. In them there was averment or evidence that the business or right sought to be protected or vindicated was of a value in excess of the jurisdictional amount. In the very case quoted from in appellant's brief, p. 24, *Scott* v. *Donald*, 165 U. S. 107, that very clearly appears (p. 114). In passing, we may say that we are unable to find in the opinion in that case the language quoted by appellant and attributed to this

court. In *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, cited by appellant, it was said (p. 225):

> Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced.

To bring himself within the principles of these cited cases, it would be necessary for appellant to assert or prove that *the right to have these payments made to him while he was under the influence of intoxicating liquors, or while such liquors were within convenient reach*, was of a value above $3,000, the jurisdictional amount.

We desire to emphasize the point that the income of appellant is not being taken away from him. It is not lost to him but is merely being withheld temporarily. It rests with him to remove the cause of the refusal to make payments.

III

Section 2087 was full warrant for the withholding of appellant's share of the income of the Osage Tribe; that such legislation is constitutional is too well settled to admit of doubt

No question is presented by this record of the correctness of the *facts* upon which the officials determined that payments to appellant were forbidden by §2087. The claim is that that section is inap-

plicable to these payments and was repealed as to them, and in any event is unconstitutional.

Section 2087 was but one of a series of enactments by Congress in furtherance of its avowed policy of absolute suppression of traffic in intoxicating liquors so far as the Indians are concerned. In this respect, a fixed and unchanging policy has been pursued with beneficial results. *United States Express Co.* v. *Friedman*, 191 Fed. 673; *United States* v. *Wright*, 229 U. S. 226, 237; *United States* v. *Birdsall*, 233 U. S. 223, 232.

All legislation affecting the Indians and their property must be construed in the light of this fixed and constant policy. *United States* v. *Sweet*, 245 U. S. 563. Section 2087 is broadly written—"no annuities, or money or goods, shall be paid or distributed." It has application to all payments; and properly it must have if it is to serve the purpose for which it was enacted. Therefore in every statute providing for payments of annuities or money or goods to Indians this section is incorporated by implication unless *expressly* or by plain intendment excluded. An intention to limit its scope or to exclude its operation, or to repeal it *pro tanto* in any particular instance, is not to be presumed, but, because of the policy in aid of which it was enacted, an intention to do so must be clearly expressed.

The Act of March 3, 1921, upon which appellant predicates his right to payment, makes no reference to § 2087; there is in it nothing which by any fair, indeed any strained, construction could be said to

indicate a purpose to restrain or qualify or modify its operation, or to repeal it *pro tanto* or otherwise.

Now there is no repugnancy between these two statutes. The Act of March 3, 1921, deals with income payments to Osages; §2087 deals with payments to all Indians. There is no reason why both acts can not be given effect.

The settled rule is that repeals by implication are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect can not reasonably be given to both. *Washington* v. *Miller*, 235 U. S. 422, 428. It is the duty of the court to give effect to both statutes, if possible. *United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605.

United States v. *Healey*, *supra*, seems particularly in point. The question there presented was whether the original desert-land Act of 1877 providing that lands of the character thereby made subject to entry should be disposed of at $1.25 per acre superseded §2357, R. S., which required that public lands along the line of railroads within the limits granted by Congress be sold at $2.50 per acre. It was held that no repeal was effected and that desert lands within railroad limits were subject to the terms of § 2357.

We regard as controlling, in principle, *United States* v. *Barnes*, 222 U. S. 513. In that case it was sought to avoid the effect of § 3177, R. S., which authorized specified revenue officers to enter any

building or place where any articles or objects subject to tax are made, produced or kept, for the purpose of inspecting such articles or objects, and a refusal by any person to admit the officer, or to suffer an inspection of the articles or the hindering or preventing of such officer in the exercise of his power and authority, was made a penal offense. It was asserted that this statute was not applicable to the collection or enforcement of the tax imposed on oleomargarine under a later Act, because certain sections of the Revised Statutes were extended to the taxes imposed by the later Act, and hence those sections and no others were applicable.

Ruling against this contention and holding § 3177 applicable, this court said (p. 520):

> Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.

This principle was reiterated in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 384, thus:

> But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a compre-

> hensive general statute, * * * subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed.

The Indian Office has consistently construed §2087 to be applicable broadly to all payments made to Indians. In the Regulations of the Indian Office, effective April 1, 1904, §2087 is incorporated verbatim as §329 of those regulations. This construction by those in charge of the administration of the Act is entitled to great respect and is not to be lightly disregarded. *LaRoque* v. *United States*, 239 U. S. 62, 64; *Harris* v. *Bell*, 254 U. S. 103, 109; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

The claim of appellant that §2087, as applied to him is unconstitutional, is based upon the proposition that the money is his individual property which is protected by the Fifth Amendment. But the trouble with this assertion is that it leaves out of consideration the point that this money was placed to his individual credit pursuant to legislation of Congress. He is claiming under this legislation—without it, he would have no right. Therefore, as he must concede the power of Congress to provide for the distribution of interest, and bonus and royalties, he must necessarily also concede the power to impose conditions under which the distribution shall be made. Now, as we have seen, the provisions of

§2087 were, by implication, made a part of the legislation covering this distribution. Certainly appellant cannot rely upon the legislation and at the same time deny its validity. But even if he were in a position to attack the legislation under which he claims, he would be no better off. A survey of the enactments relating to the Osages will demonstrate this.

The Act of June 28, 1906, c. 3572, 34 Stat. 539, provided for the division of the lands and funds of the Osage Indians. After directing the manner in which the lands should be allotted so as to give each member his fair share, and which were to be inalienable for twenty-five years, except where the Secretary issued a certificate of competency under which the individual Indian might dispose of his *surplus* lands, it was declared, §2, 7th paragraph, p. 542:

> That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided.

And in §3, p. 543:

> That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years.

By §4, p. 544, it was provided:

> That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may

> become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided.

It is then provided that such funds shall be segregated and placed to the credit of the individual members of the tribe on a basis of pro rata division among the members or to their heirs, and that said credit shall draw interest as now authorized by law; this interest as it accrues to be paid quarterly to the members entitled thereto.

A further provision was that royalty received from mining leases should be placed in the Treasury to the credit of the individual members and be paid in the manner and at the same time that the payments are made of interest on the other moneys held in trust.

The Act of April 18, 1912, c. 83, 37 Stat. 86, upon which appellant lays so much stress as repealing all acts in conflict, did not make any provision touching payment of interest arising from the trust funds or the royalties accruing from leases—certainly none in conflict with the Act of 1906 in that regard.

A radical change was made by the Act of March 3, 1921, in the particulars already noted. Instead of paying to those without a certificate of competency all the income accruing quarterly, but $1,000 was to be paid if the income was sufficient to pay that sum.

From the foregoing it is clear that the royalties (which include bonus moneys—*Work* v. *Mosier*, 261

U. S. 352) were in the first instance tribal property. The individual Indian had no part in the making of the leases, for that was distinctly a matter affecting tribal property. As the royalties were tribal property, Congress had complete and plenary power to deal with them as it saw fit and could impose such terms and conditions upon their disbursement as it deemed best for the protection and welfare of the Indians. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Gritts* v. *Fisher*, 224 U. S. 640; *Sizemore* v. *Brady*, 235 U. S. 441.

Respecting the interest accruing on the trust funds placed to the credit of the individual Indians, we call attention to the fact that the United States is paying this interest. We do not think any one will question the right or authority of Congress in agreeing to pay interest, to impose conditions governing that payment.

Moreover, it is well to bear in mind that these Acts of Congress make provision for payments of income accruing in the future—before any individual right attached to it.

We confess to some difficulty in following the argument of appellant with respect to the operation of §2087. On page 17 of his brief he says that §2087 has to do with tribal property, and then in the next sentence but one he asserts that the section "was for the purpose of paying out *funds and goods of the United States.*"

However, we may meet him on both propositions. The royalty and bonus moneys are tribal property; the interest on the trust funds is money paid out of the United States funds. How much of each makes up the money here involved is not shown.

We do not, however, rest upon that but on a much broader consideration: Section 2087 has no qualification such as appellant applies to it. It declares that "no annuities, or moneys, or goods shall be paid or distributed," etc.

There is no sound reason why it should be construed to apply only to money of the United States. Indeed, considering the purpose of the statute and the policy behind it, there is every inducement to apply it to all payments made whether of the tribal funds or government funds.

The statute was designed to protect not the United States but the Indian. To construe it as appellant does would be to frustrate the purpose and policy of Congress. So far as the Indian is concerned, it would be just as bad to distribute his pro rata share of *tribal* money to him when drunk as it would be to distribute his pro rata share of *government* money.

On the merits the judgment should be affirmed.

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NOVEMBER, 1924.

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